

## SETTLEMENT AGREEMENT

This Settlement Agreement is made by and among the Division of Energy, Mineral, and Land Resources of the North Carolina Department of Environmental Quality ("Respondent" or "DEMLR"), formerly the North Carolina Department of Environment and Natural Resources, and Apex Nurseries, Inc., William R. Copeland, Jean Copeland, Ronald Copeland and Nancy Copeland ("Petitioners" or "Apex"). The above named entities are hereinafter collectively referred to as the "Parties."

WHEREAS, Respondent assessed two penalties against Petitioners for conducting land disturbing activities in violation of the Sedimentation Pollution Control Act of 1973 and Rules promulgated thereunder ("Act");

WHEREAS, Petitioners filed petitions for contested case hearings 15 EHR 5865 and 15 EHR 5866 contending, among other things, that the sites are exempt from the Act under the agricultural exemption set forth in N.C. Gen. Stat. § 113A-52.01, and that proper jurisdiction and technical assistance rests within the Soil Conservation Districts Law;

WHEREAS, the parties desire to settle this dispute to avoid unnecessary and extensive litigation and ensure an equitable resolution for both sides;

NOW THEREFORE, in consideration of the mutual promises set forth in this Settlement Agreement, the Parties agree as follows:

1. Apex Nurseries, Inc. shall implement the conservation practices on parcels 17828, 79696 and 17795 ("the parcels"), as presented in the Apex Nurseries Conservation Plan submitted to DEMLR on July 1, 2016, and approved by DEMLR on July 8, 2016 and attached as Exhibit A. Submission of the Apex Nurseries Conservation Plan is made to DEMLR for purposes of settling a disputed claim, and shall not be construed as an admission of liability or admission of jurisdiction by Petitioners.
2. Because Petitioners submitted an application for a stormwater permit after a meeting with Respondent in attempt to resolve the issues presented in these contested cases, Petitioner and Respondent agree that Petitioners will submit a rescission request form of their Industrial Stormwater General Permits 21, NCG210436 and NCG210437 previously submitted on July 29, 2015 and received by Respondent on August 4, 2015. If the permit is not rescinded, Petitioners reserve the right to lift the stay and revive the contested cases that are the subject to this settlement agreement.
3. On July 11, 2016 after execution of this Settlement Agreement, Respondent will rescind the Civil Penalty Assessment and the underlying Notice of Violation in its enforcement case denoted as LQS 15-017. Respondent will update its database, files and reference records to reflect this action. Petitioners will then file a voluntary dismissal of 15 EHR 5866.


4. Upon execution of this Settlement Agreement, both parties will file a joint motion to stay contested case number 15 EHR 5865 until March 2017.
5. At the election of Apex Nurseries, Apex Nurseries may submit calculations to show the measures in place are sufficient to stabilize the sites at locations 2, 5, 8, and 9, or once Apex Nurseries has broken ground and completed any measures, such as regrading and seeding, Apex Nurseries, through counsel, will send three (3) photographs of site locations 2, 5, 8 and 9, as identified on the parcel map in Exhibit A, to Respondent. The three photographs of each location will contain one photograph from the upslope angle, one from the downslope angle, and one up close photograph. The photographs will be sent to Respondent who may respond with non-binding technical assistance. If Respondent has technical assistance advice for Apex Nurseries, they shall convey that advice through counsel and Apex Nurseries may consider the technical assistance.
6. At the request of Apex Nurseries, once the conservation practices outlined in the Conservation Plan, attached as Exhibit A, have stabilized on the parcels, but before March, 2017, Respondent agrees to visit Petitioners' property within 10 days of being notified to confirm that the parcels are stabilized in accordance with the Conservation Plan. If the parties agree, Respondents will sign a statement of completion and satisfaction attached as Exhibit C on site. If the parties disagree, the parties will request the North Carolina Department of Agriculture and Consumer Services, Division of Soil and Water Conservation, conduct a site assessment to determine if the conservation practices outlined in the Conservation Plan have stabilized on the parcels. The recommendations of the Division of Soil and Water Conservation shall be binding on both parties: Apex Nurseries will implement the recommendations and DEMLR will not take further action regarding the parcels.
7. Upon completion and satisfaction of this Agreement with the execution of Exhibit C, Respondent, Department of Environmental Quality, shall issue a letter acknowledging Petitioners' exemption from the SPCA with language agreed upon by the parties and attached hereto as Exhibit B.
8. After Respondent executes Exhibit B (the exemption for Apex Nurseries), and Exhibit C (completion and satisfaction of this agreement), Petitioners will voluntarily dismiss their petition without prejudice for Civil Penalty LQS 15-016.
9. After both of the contested cases have been dismissed and resolved, Petitioners agree to make a settlement payment to Respondent in the amount of TWO THOUSAND AND SEVEN HUNDRED FIFTY DOLLARS (\$2,750.00) to resolve these matters, but not as payment of a civil penalty or a plan review fee. Petitioners' settlement payment shall not be an admission of liability or a concession of jurisdiction.

10. The settlement of this matter will result in a designation in DEMLR's SPCA report and any other database, files or reference records of Respondent that "jurisdiction was contested and unresolved in OAH" for Civil Penalty LQS 15-016. Petitioners maintain the right to contest any future enforcement action and to challenge jurisdiction to the extent provided by law without any negative effect created by this settlement.
11. Entry into this settlement by Respondent shall not be construed as an admission of liability by Respondent or a concession that jurisdiction does not apply.
12. The Parties agree that the consideration for this Settlement Agreement is in the promises contained herein, that this Settlement Agreement contains the whole agreement between them, and that there are no understandings or agreements, verbal or otherwise, regarding this Settlement Agreement except as expressly set forth herein.
13. This Settlement Agreement is contractual in nature and not just a recitation of terms. The language of this Settlement Agreement shall be construed, enforced, and governed by the laws of the State of North Carolina and the venue and forum for any enforcement proceedings shall be in the courts of either Wake County or Chatham County.
14. This Settlement Agreement may be executed in counterparts, each of which delivered by one party to the other party by fax or electronic means will be deemed originals. All counterparts so executed shall constitute one agreement binding on all of the Parties, notwithstanding that all of the Parties are not signatories to the same counterpart.
15. No change or modification of this Settlement Agreement shall be valid unless same is in writing and signed by the Parties to the Settlement Agreement. Any and all oral agreements shall be void and of no effect unless reduced to a writing and signed by the Parties hereto. Any amendments to this Settlement Agreement may be signed in counterparts and delivered by one party to the other party electronically, by mail, or in person.
16. The waiver of any breach of any term or condition of this Settlement Agreement does not waive any other breach of that term or condition or the enforcement of any other term or condition.
17. If any part of this Settlement Agreement is held to be illegal, void, or unenforceable for any reason, such holding shall not affect the validity and enforcement of any other part of this Settlement Agreement.
18. This Settlement Agreement shall be binding upon and inure to the benefit of the assigns, heirs, executors, and administrators of Apex Nurseries, Inc. et al. and to the

Division, its Department, and its officials, managers, employees, assigns, predecessors, and successors.

19. This Settlement Agreement shall be binding upon the Parties upon execution by the undersigned. The Settlement Agreement becomes effective on the last date of the signatures of the undersigned.

PETITIONERS

By:   
William R. Copeland

Date: 2/8/16

RESPONDENT

By:   
Tracy Davis, Director, DEMLR

Date: 2/8/2016

Exhibit A

Apex Nurseries Conservation Plan

[Placeholder for separate document entitled Apex Nurseries Conservation Plan  
consisting of 14 pages and additional attachments]

Exhibit B

Agriculture Exemption Acknowledgment

The Division of Energy, Mineral and Land Resources acknowledges that the land and activity under the control and operation of Apex Nurseries, Inc. qualifies as agriculturally exempt and is not under the jurisdiction of N.C. Gen. Stat. § 113A-50, et seq., (the Sedimentation Pollution Control Act), as set forth in N.C. Gen. Stat. § 113A-52.01(1).

As long as Apex Nurseries, Inc. continues to follow best management practices for agriculture as recommended by the Chatham County Soil and Water Conservation District, the Natural Resources Conservation Service and the Agricultural Extension Agent and the Forest Practice Management Guidelines for forestry, it will maintain its exemptions. Specifically, but not exclusively, the Sedimentation Control Commission, DEMLR and delegated local programs will have no course of action under the Sedimentation Pollution Control Act of 1973.

The Chatham County Building Inspection Office will be notified of this exemption so that if future non-exempt activity is proposed, it may withhold building or other development permits until a submission and approval of an acceptable Erosion and Sedimentation Control Plan is made, if required by law.

This, the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Printed Name  
Director, DEMLR

\_\_\_\_\_  
Signature

Exhibit C

Completion and Satisfaction of Settlement Agreement

I, \_\_\_\_\_, representative of DEMLR, do hereby declare that the conservation practices on parcels 17828 and 79696, that are under the control and operation of Apex Nurseries, have been completed pursuant to the Settlement Agreement between Petitioners, Apex Nurseries, et al, and Respondent, DEQ, in satisfaction of the agreement entered into for settlement of contested case number 15 EHR 5865.

This, the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Signature